

# The Efficacy, Limitations, and Continued Need for Authorizations for Use of Military Force

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## TABLE OF CONTENTS

ABSTRACT .....	2
INTRODUCTION .....	2
I. DICHOTOMY OF POWERS .....	5
A. <i>Objectives of the Founding Fathers</i> .....	8
B. <i>President's Independent and Executive Constitutional Powers</i> .....	10
C. <i>Congress's War Powers</i> .....	12
D. <i>The War Powers Resolution (WPR)</i> .....	13
II. AUMF 2001 .....	15
A. <i>Geographical Location</i> .....	16
B. <i>Association with 9/11</i> .....	16
C. <i>Enemy</i> .....	17
1. <i>Terrorist Organizations</i> .....	18
2. <i>Associated Forces</i> .....	19
D. <i>ISIS</i> .....	21
E. <i>Duration</i> .....	23
III. THE AUMF 2002 .....	25
IV. NEW AUMF: PROPOSALS AND COUNTER-PROPOSALS .....	25
A. <i>Proposals for a New AUMF</i> .....	26
B. <i>Proposals to Repeal or Limit the Existing AUMFs</i> .....	28
C. <i>Scope of the New AUMF</i> .....	30
V. NO NEED FOR A NEW AUMF .....	30
VI. INTERNATIONAL LAW .....	32
CONCLUSION .....	33

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## ABSTRACT

*In the fight against ISIS, the U.S. has conducted airstrikes, deployed forces, supported rebellions, trained nonstate actors, and used military funds in Iraq and Syria. This fight has raised questions regarding the validity of U.S. authority to use force against ISIS. Imperialists, comprising the U.S. president and a few congressmen, seek to fight ISIS and believe that the authority to use force against ISIS comes from the independent presidential executive powers and Authorizations for Use of Military Force (AUMFs) in 2001 and 2002. Contrary to their legal conviction and justifications, imperialists are seeking a new AUMF from Congress to be able to fight ISIS. On the other hand, congressionalists, comprising the majority of congressmen, do not seek war with ISIS and believe that this fight is unauthorized, as the president has no independent executive powers in non-defensive wars and the scope of AUMFs 2001 and 2002 does not include ISIS. Moreover, congressionalists do not want to pass a new AUMF because the US has not suffered a large armed attack by ISIS, the war on terror has been proved counterproductive, and AUMFs 2001 and 2002 and military funds have been misinterpreted and misused in the past. This Article concludes that the U.S. does not need a new AUMF, because imperialists lack a convincing legal argument for the advocacy of imperial presidential powers or the expansive interpretation of previous AUMFs. Moreover, the fact that a new AUMF has not yet successfully passed, despite numerous calls, reflects the consensus among the majority of congressmen that the U.S. does not need a new AUMF or a new never-ending war.*

## INTRODUCTION

The Authorization for Use of Military Force (AUMF) 2001 authorizes the United States' (U.S.) president to use force against the perpetrators and plotters of the September 11, 2001 (9/11) events.<sup>1</sup> It also allows the use of force against the nations that harbored the people responsible for these events.<sup>2</sup> Similarly, the AUMF 2002 allows the use of force against Iraq to enforce United Nations Security Council resolutions against the threats posed by Iraq.<sup>3</sup> The subsequent fights against these threats and the persons responsible resulted in over seventeen years of war in the

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1. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted); 50 U.S.C. § 1541 (2018).

2. *See id.*

3. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3(a)(1) (2002) (enacted); 50 U.S.C. § 1541 (2018).

Middle East,<sup>4</sup> using more than a trillion U.S. dollars of military funds,<sup>5</sup> and causing the devastation of numerous countries along with civilian casualties;<sup>6</sup> counterproductive increases in terrorism;<sup>7</sup> the support and training of rebel groups that also increase terrorism;<sup>8</sup> and the destabilization of regions.<sup>9</sup> This has all led people to question the validity, legality, need, and efficacy of this war in respect to the fight against the Islamic State in Iraq and Syria (ISIS)<sup>10</sup> and the delegation of authority of war powers by Congress to presidents to use force under AUMFs 2001 and 2002. In response, presidents have claimed that independent war powers are guaranteed under the Constitution and they have relied on an expansive interpretation of the AUMF 2001 and 2002.<sup>11</sup> Under the umbrella of the phrase “associated forces” (which is discussed in detail later in Section II.C.2), there have been attempts to include ISIS within the scope of AUMFs 2001 and 2002, to link ISIS with the 9/11 events, and to justify this continuation of war, especially in Iraq and Syria.<sup>12</sup> Presidents, while claiming independent war powers to justify their actions, have sought new authorization to use force against ISIS.<sup>13</sup> Many congressmen and scholars have denied the

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4. *US “War on Terror” Still Rages on 17 Years After 9/11*, TRT WORLD (Sept. 11, 2018), <https://www.trtworld.com/life/us-war-on-terror-still-rages-on-17-years-after-9-11-20138> [<https://perma.cc/CQX5-74VN>].

5. AMY BELASCO, CONG. RESEARCH SERV., RL33110, *THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11* 5 (2014).

6. MELVIN A. GOODMAN, *NATIONAL INSECURITY: THE COST OF AMERICAN MILITARISM* 15 (2013).

7. GARY DORRIEN, *ECONOMY, DIFFERENCE, EMPIRE: SOCIAL ETHICS FOR SOCIAL JUSTICE* 227 (2010).

8. David E. Sanger, Eric Schmitt & Ben Hubbard, *Trump Ends Covert Aid to Syrian Rebels Trying to Topple Assad*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/world/middleeast/cia-arming-syrian-rebels.html> [<https://perma.cc/5EC2-F9FG>].

9. See DORRIEN, *supra* note 7.

10. ISIS is also commonly referred to as the Islamic State of Iraq the Levant (ISIL) as it is a more traditional translation of the Arabic name. Ray Sanchez, *ISIL, ISIS or the Islamic State?* CNN (Oct. 25, 2017, 1:30PM), <https://www.cnn.com/2014/09/09/world/meast/isis-isil-islamic-state/index.html> [<https://perma.cc/TZ4M-2XAG>]. However, throughout this Article any reference to the jihadist group will be through the use of ISIS.

11. REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 7 (2016) [hereinafter REPORT].

12. See *id.* at 4–7.

13. Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. § 2 (2015); see also Letter from President Barack Obama to Congress (Feb. 11, 2015) (on file with the Obama White House Office of the Press Sec’y).

independent presidential authority to fight this war against ISIS. Now, the U.S. is divided into two main groups. One group of people, including the executive branch of government, the President, and a few congressmen and scholars, arguing that the U.S. needs a new AUMF to be able to fight ISIS.<sup>14</sup> This group argues that a president has independent powers to use force against ISIS,<sup>15</sup> while also claiming authority under an expansive interpretation of AUMFs 2001 and 2002.<sup>16</sup> This group also demands a new AUMF, with few limitations, to fight ISIS, its cobelligerents, associated forces, and successors to be able to execute a new unending war.<sup>17</sup> The second group of people, including a majority of congressmen and scholars, argue that the U.S. does not need a new AUMF to fight ISIS because the U.S. is not at war with ISIS and international law does not allow the use of force against a mere threat and not an actual armed attack.<sup>18</sup> This group also advocates the revocation of the existing 2001 and 2002 AUMFs because it believes that these authorizations have been misinterpreted, abused, and misused to rationalize invalid, unending, and unjustified wars.<sup>19</sup>

Therefore, to analyze whether the U.S. needs a new AUMF against ISIS or not, this Article is divided into six relevant sections that discuss both sides of the argument. Part I examines the dichotomy of war powers between Congress and the president of the U.S. It will discuss the objectives of the founding fathers, the president's constitutional and independent presidential powers, congressional powers, and the War Powers Resolution, while relating these with the narratives of renowned scholars within this context. Part II discusses the scope and interpretation of the AUMF 2001 in detail. Within this section, the notions and characteristics of a number of limits—geographical location; association with the 9/11 events; being an enemy under the AUMF 2001 including terrorist organizations, associated forces, ISIS; and duration of the war—will be interpreted. Part III fleetingly

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14. See Gregory A. Wagner, *Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL*, 46 U. MEM. L. REV. 235, 262 (2015).

15. See REPORT, *supra* note 11.

16. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. § 2 (2015); see also S.J. Res. 47, 113th Cong. (2014); H.R.J. Res. 27, 114th Cong. (2015); H.R.J. Res. 33, 114th Cong. § 2 (2015); S. Res. 1587, 114th Cong. §§ 3, 8 (2015); H.R. Res. 4208, 114th Cong. § 3 (2015); S.J. Res. 26, 114th Cong. (2015); S.J. Res. 29, 114th Cong. (2016).

17. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015).

18. See Wagner, *supra* note 14, at 255–57; see also H.R. 1303, 114th Cong. (2015).

19. MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS 7–8 (2017).

defines the meaning and scope of the AUMF 2002. Part IV briefly discusses the proposals for a new AUMF against ISIS including proposals to repeal or limit the existing AUMFs while not seeking a new AUMF to fight ISIS. Part V analyzes why some people and congressmen do not wish to authorize a new AUMF against ISIS when there have been so many calls to do so. Part VI concisely discusses the international law of using force in the context of war fought and to be fought under the AUMF 2001, the AUMF 2002, and the proposed “new AUMF against ISIS.”

## I. DICHOTOMY OF POWERS

Douglas Kriner argues that the war powers of the president and Congress of the U.S. are wrongly dichotomized into two clear camps.<sup>20</sup> One being that Congress has exclusive authority to initiate wars, and therefore all presidential conduct outside this scope is unconstitutional and unlawful.<sup>21</sup> The second being that the president has the discretionary power to initiate wars with or without congressional involvements.<sup>22</sup> These wholly contradict each other. Rather, Douglas Kriner, Mariah Zeisberg, and Stephen Griffin believe that there is an interbranch deliberation between Congress and the president of the U.S. where Congress creates a democratic accountability that imposes tangible political costs on presidents, varying case to case, yet significant enough at times to change the course of war policies.<sup>23</sup> However, Congress has failed to compel presidents through legislation. Therefore, the imperial presidency independent of congressional involvement and imperial congressional powers independent of presidential involvement do not exist. Rather, the real balance of war powers lies between these two opposing poles.<sup>24</sup>

For instance, a plain reading of the Constitution, the Convention, and the ratification debates leaves no ambiguity in suggesting that a president

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20. Douglas Kriner, *Accountability Without Deliberation? Separation of Powers in Times of War*, 95 B.U. L. REV. 1275, 1279–80 (2015).

21. *See id.* at 1275.

22. *Id.*

23. *See id.* at 1288–91; MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 41 (2013); STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 50 (2013).

24. Kriner, *supra* note 20, at 1296.

cannot independently initiate a war without involving Congress.<sup>25</sup> However, Congress delegated sweeping powers to the president through the AUMF in 2001<sup>26</sup> by writing a blank check<sup>27</sup> “to deter and pre-empt any future acts of terrorism or aggression against the United States.”<sup>28</sup> Although, Congress limited this with the requirement of appropriate and necessary actions against the plotters and perpetrators of the events of 9/11.<sup>29</sup>

Conversely, Presidents have claimed that they possess the prerequisite authority as commander in chief to initiate wars without involving Congress under Article II of the Constitution.<sup>30</sup> Particularly, following the precedent of John Yoo at the Office of Legal Counsel, President Obama argued that Congress could not limit the presidential powers under the Constitution through the AUMF<sup>31</sup> and questioned the legitimacy of legislation against presidential powers. Subsequently, Obama used force against ISIS thirteen years after AUMF 2001<sup>32</sup> with no involvement of Congress and without ISIS’s association to the 9/11 events. Scholars were eager to decry these events as the return of the “imperial presidency.”<sup>33</sup> In the past, President Polk’s provocation of the Mexican–American War in 1846 had set the example for this imperialism.<sup>34</sup> Congress lamented this event at that time by stating “it sets the example, which will enable all future Presidents to bring about a state of things, in which Congress shall be forced, without deliberation, or reflection, to declare war, however opposed to its convictions

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25. See U.S. CONST. art. I § 8, cl. 11, art. II § 2 cl. 1; see also Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 674–75 (1972).

26. See Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted).

27. See Kriner, *supra* note 20, at 1276.

28. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2 (2007); see also § 1541 note (Authorization for Use of Military Force Against September 11 Terrorists).

29. See § 1541 note (Authorization for Use of Military Force Against September 11 Terrorists); see also Kriner, *supra* note 20, at 1276.

30. U.S. CONST. art. II, § 2; see Kriner, *supra* note 20, at 1276.

31. See generally The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 210 (2001).

32. Kriner, *supra* note 20, at 1276.

33. See generally CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 14 (2007) for a discussion of “imperial presidency” throughout history when presidents invoked national security to seize more power from Congress by advancing the philosophy that the president wields “vast ‘inherent’ and independent powers not spelled in the Constitution” that permit a president to defy Congress.

34. See JOHN H. SCHROEDER, MR. POLK’S WAR: AMERICAN OPPOSITION AND DISSENT, 1846-1848, at 24 (1973).

of justice or expediency.”<sup>35</sup> Subsequently, the same imperialism was repeated by President Jefferson in the Tripolitan War,<sup>36</sup> then by President Johnson in the Vietnam War, then again in Korea by President Truman, and more recently in Syria and Libya by President Obama.<sup>37</sup> In fact, presidents have used force without congressional authorization in at least 125 instances.<sup>38</sup>

In opposing this imperialism, Griffin sympathizes with the congressionalists and argues that even presidents in the eighteenth and nineteenth centuries did not claim unilateral war powers while asserting executive powers, such as Polk who attached congressional approval and war declarations in Rio Grande and Mexico.<sup>39</sup> In an example of stark contrast between presidential imperialism and congressionalists, Roosevelt cajoled Congress for American entry into World War II, whereas Truman rejected all congressional appeals to seek a declaration of war against Korea.<sup>40</sup> Misrepresenting the situation, Truman declared, “we are not at war.”<sup>41</sup> The court corrected that the Korean incident could not have been anything other than war.<sup>42</sup> Likewise, the Obama administration tried to deny the existence of war or hostilities in Libya.<sup>43</sup>

Zeisberg, on the other hand, believes that Congress and the president both have their own authorities and powers under the Constitution, where Congress can declare wars and the president can defend the nation against all attacks and aggressions.<sup>44</sup> However, she maintains that the president can only use these powers for defensive purposes and not for other purposes.<sup>45</sup> As a result, actions like Nixon’s invasion of Cambodia violates these defensive

35. *See id.*

36. *See* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 22–23 (Mariner Books 2004) (1973).

37. *See* Kriner, *supra* note 20, at 1278–79.

38. Louis Fisher, *A Challenge to Presidential Wars: Smith v. Obama*, 44 CONGRESS & THE PRESIDENCY 259, 262 (2017); Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP’T ST. BULL. 474, 484 (1966).

39. *See* GRIFFIN, *supra* note 23, at 7–8; *see also* ZEISBERG, *supra* note 23, at 78–84; Kriner, *supra* note 20, at 1280.

40. *See* Kriner, *supra* note 20, at 1280; *see also* GRIFFIN, *supra* note 23, at 8.

41. The President’s News Conference of June 29, 1950, 1950 PUB. PAPERS 502, 503 (June 29, 1950).

42. *Weissman v. Metro. Life Ins.*, 112 F. Supp. 420, 425 (S.D. Cal. 1953); *see* Fisher, *supra* note 38, at 270.

43. Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <https://www.nytimes.com/2011/06/18/world/africa/18powers.html> [<https://perma.cc/S83D-W5QW>]; Fisher, *supra* note 38, at 271.

44. *See* ZEISBERG, *supra* note 23, at 38–41.

45. *See id.* at 20; Kriner, *supra* note 20, 1281–82.

standards. Therefore, Congress and the president must work hand in hand with each other to generate an effective system of war powers comprised of interbranch deliberations and review of each other's work.<sup>46</sup>

All presidents since President Truman have contended that they enjoyed independent war powers without the approval or involvement of Congress.<sup>47</sup> Interestingly, when President Obama was a law professor and a senator, he stated that "the president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."<sup>48</sup> This is very similar to Zeisberg's narrative, where a president is only allowed to authorize the use of force as a defensive measure. However, Obama changed his stance when he took the presidential office.<sup>49</sup> Yet, it is pertinent to note here that of all the presidents to have claimed this unilateral power to authorize a war, many if not all sought or used congressional authority to use force,<sup>50</sup> which appears to be a contradiction to their legal conviction to claim independent presidential war powers. For example, President Bush sought congressional approval for the invasion of Iraq<sup>51</sup> while claiming independent authority.<sup>52</sup> Similarly, Obama also used the AUMF 2001 on numerous instances to justify his legal stance to use military force while claiming independent and exclusive war powers.<sup>53</sup> In fact, Obama sought a new AUMF from Congress to fight ISIS,<sup>54</sup> even Truman sought congressional approval through legislation.<sup>55</sup>

#### *A. Objectives of the Founding Fathers*

The framers of the U.S. Constitution intended to vest war powers in Congress, in the hands of many.<sup>56</sup> For instance, at the Philadelphia Convention of 1787, Charles Pinckney, discussing the motion of the power to make war, suggested that it is better to vest war powers in Congress because it

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46. See ZEISBERG, *supra* note 23, at 41; GRIFFIN, *supra* note 23, at 8.

47. See Kriner, *supra* note 20, at 1284.

48. David A. Fahrenthold, *On Debt and Libya, It's President Obama vs. Senator Obama*, WASH. POST (June 24, 2011), [http://www.washingtonpost.com/politics/on-debt-and-libya-its-president-obama-vs-senatorobama/2011/06/22/AGhK4AjH\\_story.html](http://www.washingtonpost.com/politics/on-debt-and-libya-its-president-obama-vs-senatorobama/2011/06/22/AGhK4AjH_story.html) [<https://perma.cc/3WBL-NN9R>].

49. See *id.*

50. See Kriner, *supra* note 20, at 1285.

51. See ZEISBERG, *supra* note 23, at 7.

52. Presidential Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002, 2002 PUB. PAPERS 1814 (Oct. 16, 2002).

53. See REPORT, *supra* note 11, at 2–8.

54. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015).

55. See 91 CONG. REC. 8185 (1945).

56. See Fisher, *supra* note 38, at 260–62.



is “more acquainted with the foreign affairs, and most capable of proper resolutions.”<sup>57</sup> Similar to the opinions of Zeisberg,<sup>58</sup> James Madison and Elbridge Gerry limited presidential war powers to “repel sudden attacks.”<sup>59</sup> Similarly, Roger Sherman commented that the president “should be able to repel and not to commence war.”<sup>60</sup> Gerry “never expected to hear in a republic a motion to empower the Executive alone to declare war.”<sup>61</sup> Likewise, George Mason was against “giving the power of war to the Executive, because [it was] not [safe] to be trusted with it. . . . He was for clogging rather than facilitating war; but for facilitating peace.”<sup>62</sup> The Madison and Gerry amendment was successfully passed.<sup>63</sup> In the Pennsylvania ratification of the Convention, James Wilson commented that the checks and balances in the system:

[W]ill not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.<sup>64</sup>

Furthermore, John Jay, in the *Federalist No. 4*, feared against executive orders that:

[M]onarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans[. . . and] . . . engage in wars not sanctioned by justice or the voice and interests of his people.<sup>65</sup>

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57. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1966).

58. See ZEISBERG, *supra* note 23, at 20.

59. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57; Fisher, *supra* note 38, at 261.

60. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57; Fisher, *supra* note 38, at 261.

61. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57; Fisher, *supra* note 38, at 261.

62. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57, at 319; Fisher, *supra* note 38, at 261.

63. Fisher, *supra* note 38, at 261.

64. 2 JAMES WILSON, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 2d ed. 1836); Fisher, *supra* note 38, at 261.

65. THE FEDERALIST NO. 4, at 101 (John Jay) (Benjamin Fletcher Wright ed., 1961); Fisher, *supra* note 38, at 261.

For instance, Bush's war against Saddam Hussein in Iraq on the false claims of possession of weapons of mass destruction and Obama's military action against Qaddafi in Libya for regime change turned healthy countries into failed states and breeding grounds for terrorism.<sup>66</sup>

### *B. President's Independent and Executive Constitutional Powers*

The Constitution of the United States vests executive powers to the president as commander in chief of the Army, Navy, and militia "when called into the actual Service of the United States."<sup>67</sup> However, the Constitution limits presidential powers in external affairs. The Constitution requires a president to acquire the consent and advice of the Senate before agreeing to a treaty or appointing ambassadors, judges of the Supreme Court, and other officers.<sup>68</sup>

Presidents argue that they are implicitly entitled to exclusive powers to initiate wars because they are commanders in chief of the armed forces under the Constitution.<sup>69</sup> Congress on the other hand, argues that presidents need congressional authorization for the use of military forces because the Constitution explicitly vests the power to declare war to Congress.<sup>70</sup> There are precedents for both arguments: where presidents have acquired congressional approval for military force and involved Congress,<sup>71</sup> and where presidents have not involved Congress to seek any kind of consent for military force.<sup>72</sup> However, even those presidents who did not involve Congress for the authorization of military force have sought congressional authorization for the use of force at other times. For instance, Truman sought congressional approval for Korea<sup>73</sup> and Obama sought congressional approval for the fight against ISIS<sup>74</sup> while claiming independent and exclusive war powers.<sup>75</sup>

Outside of Congress, presidents have also accepted the authorization to use force from regional and international organizations, such as the United Nations (UN). Initially, the UN Participation Act of 1945 explicitly stated that agreements needed congressional approval through an Act or joint

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66. Fisher, *supra* note 38, at 268.

67. U.S. CONST. art. II, § 2, cl.1.

68. U.S. CONST. art. II, § 2, cl. 2; *see* Fisher, *supra* note 38, at 261.

69. *See* Kriner, *supra* note 20, at 1279.

70. *See* ZEISBERG, *supra* note 23, at 78–84; GRIFFIN, *supra* note 23, at 7; Kriner, *supra* note 20, at 1275–78.

71. *See* GRIFFIN, *supra* note 23, at 7; Kriner, *supra* note 20, at 1280.

72. *See* Fisher, *supra* note 38, at 262.

73. *See* 91 CONG. REC. 8185 (1945).

74. *See* Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015).

75. *See* REPORT, *supra* note 11.

resolution.<sup>76</sup> By 1949, the UN Participation Act allowed presidents to act unilaterally for cooperative actions of the UN.<sup>77</sup> However, such use of personnel was limited to 1,000 noncombatant guards or observers.<sup>78</sup> As a result, Truman sought authority from the Security Council, and Clinton did so for the intervention in Haiti and Bosnia, without involving Congress.<sup>79</sup> Interestingly, when Clinton could not achieve the approval of the UN for authority to use force in Kosovo, he then turned to Congress and claimed to inform Congress in accordance with the War Powers Resolution (WPR).<sup>80</sup> Similarly, Obama sought to use the authority of the Security Council for intervention in Libya instead of congressional approval.<sup>81</sup> However, Louis Fisher argues that presidents cannot bypass the requirement of congressional authorizations under the Constitution. Therefore, any approval for the use of force from a regional or international organization is unconstitutional.<sup>82</sup> From 1789 to 1950, the presidents of the United States have acted constitutionally under the authority of Congress.<sup>83</sup> It was only after Truman's use of force without congressional approval in 1950 that presidents including Clinton<sup>84</sup> and Obama began to act unconstitutionally, claiming exclusive and independent war powers.<sup>85</sup> The Supreme Court also erroneously endorsed exclusive presidential war powers in the judgments of *United States v. Curtiss-Wright* in 1938 and *Zivotofsky v. Kerry* in 2015.<sup>86</sup>

In harmony with Zeisberg's argument that presidents only possess defensive war powers,<sup>87</sup> the Supreme Court established that "[i]f a war be made by invasion of a foreign nation, the President is not only authorized

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76. United Nations Participation Act of 1945, Pub. L. No. 79-264, § 6, 59 Stat. 619, 621 (1945); see Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1520 (1988-1989); Fisher, *supra* note 38, at 269.

77. United Nations Participation Act of 1945, ch. 660, Pub. L. No. 81-341, § 5, 63 Stat. 734, 735-36 (1949).

78. *See id.*

79. *See* Fisher, *supra* note 38, at 270.

80. SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW 404 (2002); *see* Fisher, *supra* note 38, at 270.

81. *See* JASON RALPH, AMERICA'S WAR ON TERROR: THE STATE OF THE 9/11 EXCEPTION FROM BUSH TO OBAMA 24 (2013).

82. *See* Fisher, *supra* note 38, at 269.

83. *See id.*

84. *See* RALPH, *supra* note 81.

85. *See* Fisher, *supra* note 38, at 269.

86. *United States v. Curtiss-Wright*, 299 U.S. 304 (1936); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *see* LOUIS FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS 262 (2017); Fisher, *supra* note 38, at 278.

87. *See* ZEISBERG, *supra* note 23, at 38-41; Kriner, *supra* note 20, at 1281-82.

but bound to resist the force by force,” and further that the president “does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”<sup>88</sup> This means that a president cannot initiate a war without congressional approval, but he can use defensive force without such approval.<sup>89</sup> Therefore, Jennifer Daskal argues that presidents only possess unquestioned independent defensive war powers.<sup>90</sup> However, scholars argue that presidents must obtain congressional approval for the use of military force pursuant to the WPR.<sup>91</sup> The first three presidents shared the same view.<sup>92</sup> Contrary to the prevalent beliefs of the framers,<sup>93</sup> the Supreme Court in the judgment of *Zivotofsky v. Kerry* advocated independent and exclusive presidential war powers, while distorting and misquoting the writings of Alexander Hamilton.<sup>94</sup> For instance, the court conveniently missed Hamilton’s *Federalist No. 70*, where he warns against the sole discretion of a president.<sup>95</sup>

### C. Congress’s War Powers

Through Article I, the Constitution of the U.S. vests vast powers in Congress. Article I includes:

[The] power to declare war, grant letters of marque and reprisal, coin money, raise and support armies, and provide and maintain a navy. . . regulate commerce with foreign nations, define and punish piracies and felonies committed on the high seas, make rules concerning captures on land and water, and make rules for the government and regulation of the land and naval forces . . . execute the laws of the Union, suppress Insurrections, and repel Invasions.<sup>96</sup>

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88. Prize Cases, 67 U.S. 635, 668 (1862); Jennifer C. Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT’L SECURITY J. 115, 136 (2014); see U.N. Charter art. 51.

89. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2058 (2005); see THE PAPERS OF THOMAS JEFFERSON 224 (J. Jefferson Looney ed., 2004).

90. See Daskal & Vladeck, *supra* note 88, at 136–37.

91. War Powers Resolution, 50 U.S.C. §§ 1541–1549 (1973); see Daskal & Vladeck, *supra* note 88, at 137.

92. See Bradley & Goldsmith, *supra* note 89; 30 GEORGE WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 73 (John C. Fitzpatrick ed., 1931); 7 ANNALS OF CONG. 57 (1797); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 186–87 (1997).

93. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57; ELLIOT, *supra* note 64; THE FEDERALIST NO. 41, at 295 (James Madison) (Benjamin Fletcher Wright ed., 1961); Fisher, *supra* note 38, at 261.

94. See Zivotofsky, 135 S. Ct. at 2085–86 (2015); Fisher, *supra* note 38, at 262.

95. THE FEDERALIST NO. 70, at 458 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); see Fisher, *supra* note 38, at 268–69.

96. U.S. CONST. art. I, §§ 8, 10; Fisher, *supra* note 38, at 260–61.

Under the Constitution, Congress is empowered to authorize the executive branch to use force against any extended threat posed by a group of people.<sup>97</sup> For example, it did so against the perpetrators and plotters of the 9/11 attacks through the 2001 AUMF,<sup>98</sup> though there is no precedent for using force against any such groups under the independent authority of a president. Why does the Constitution empower Congress to repel invasions along with the overall power to declare war if it intended to empower the president to have independent war powers? The founding fathers were well aware that initiating a war, and thus spending billions of tax dollars, is a matter of public debate that cannot be entrusted to a single person.<sup>99</sup>

In 1807, in the famous case of *United States v. Smith*, the federal appellate court underscored the ability of congressional war powers to limit the presidential powers and executive orders to initiate hostilities.<sup>100</sup> In this case, Colonel William Smith was indicted for using force against Spain without congressional approval.<sup>101</sup> The court rejected the claim that a president could somehow violate congressional policy (the Neutrality Act of 1794) by authorizing use of military force, and stated that the statute is “declaratory of the law of nations; and besides, every species of private and unauthorized hostilities is inconsistent with the principles of the social compact, and the very nature, scope and the end of civil government.”<sup>102</sup> The court further established that Smith was right in following the orders of his chief, but a president cannot waive the statutory provisions and “cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.”<sup>103</sup>

#### D. The War Powers Resolution (WPR)

In 1973, Congress passed the War Powers Resolution (WPR) through legislation to limit the extensive claimed presidential war powers.<sup>104</sup> The WPR was vetoed by President Nixon because he believed that the legislation was encroaching upon the constitutional presidential war powers he held

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97. U.S. CONST. art. I, § 10; see Daskal & Vladeck, *supra* note 88, at 138.

98. See Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted).

99. See Daskal & Vladeck, *supra* note 88, at 138.

100. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

101. See *id.*

102. *Id.* at 1229.

103. *Id.* at 1230.

104. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1549 (1973).

as commander in chief.<sup>105</sup> He stated that alteration in the powers of a president under a constitution cannot be achieved by legislation but only through an amendment in that constitution.<sup>106</sup> He believed that presidents are empowered with unilateral powers to initiate wars as commanders in chief; therefore, this legislation was clearly unconstitutional and was undermining the U.S.'s foreign policy.<sup>107</sup> All other presidents after Nixon have also believed that the WPR is unconstitutional.<sup>108</sup> By contrast, Congress's view has been that all unilateral authorizations of military force by presidents in the absence of any imminent attack and without congressional approval are unconstitutional, which is why it passed the WPR to clarify the limitations of presidential and congressional war powers.<sup>109</sup>

The WPR limited the scope of presidential powers to three conditions under which a president can use unilateral force without seeking congressional authorization. First, to repel, retaliate, and forestall an imminent threat of armed attack against U.S. territory. Second, to repel, retaliate, and forestall an imminent threat of armed attack against U.S. forces outside its territory. Third, to repel, retaliate, and forestall an imminent threat of armed attack against U.S. citizens and nationals outside U.S. territory.<sup>110</sup> The WPR further explains that the presidential war powers under Article II of the Constitution only permit a president as a commander in chief to order troops pursuant to: (i) a declaration of war, (ii) statutory authorization, or (iii) a national emergency created by an attack against the U.S., its territory, or its armed forces.<sup>111</sup> The most important limitation on the presidential war powers by the WPR is the time limitation. Unless Congress authorizes otherwise, the use of armed forces must be terminated automatically after sixty days, with an additional thirty-day time limit for the withdrawal of personnel in the event of a threat to their lives in immediate withdrawal.<sup>112</sup> This limitation creates the required check and balance on the presidential war powers, yet allows forces to defend the U.S. against any imminent threat

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105. Stephen M. Griffin, *The Executive Power*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 343, 354 (Mark Tushnet et al. eds., 2015).

106. Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strikes against Libya, 1986 PUB. PAPERS 478 (Apr. 16, 1986).

107. See Griffin, *supra* note 105; Wagner, *supra* note 14, at 243; Richard Nixon, *Veto of the War Powers Resolution*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/veto-the-war-powers-resolution> [

108. See Wagner, *supra* note 14, at 243.

109. See Fisher, *supra* note 38, at 271–72.

110. See War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1549 (1973).

111. *Id.* § 1541(c).

112. See *id.* § 1544(b) (requiring the President to “terminate any use of United States Armed Forces” within sixty calendar days after either a report is submitted or required to be submitted pursuant to 50 U.S.C. § 1543).

effectively, without congressional approval.<sup>113</sup> The WPR also requires a president to consult Congress before introducing its forces in any hostilities against imminent attack and comply by reporting back to Congress, which triggers the sixty-day timeline.<sup>114</sup> Under the WPR, Congress can, at any time through a concurrent resolution, also demand the withdrawal of U.S. forces if they are engaged in hostilities without a declaration of a war.<sup>115</sup> In 1975, President Ford reported to Congress after “ordering the U.S. armed forces to retake the Mayaguez.”<sup>116</sup> This was the only report to have cited Section 4 of the WPR, triggering the sixty-day limitation.<sup>117</sup> It was also completed in the sixty-day timeline required by the WPR.<sup>118</sup> In 2001, Congress authorized President Bush to use force against perpetrators and plotters of the 9/11 events (AUMF 2001),<sup>119</sup> and in 2002 it authorized President Bush to use force in Iraq (AUMF 2002).<sup>120</sup> In support of Congress, the Supreme Court has repeatedly upheld that presidential wartime actions not approved by Congress are invalid.<sup>121</sup>

## II. AUMF 2001

After the 9/11 attacks on the World Trade Center in the U.S., Congress authorized the president to use military force against the perpetrators and the plotters of the event in 2001.<sup>122</sup> This authorization contains four main components: (i) authorization of powers, (ii) identification of the enemy, (iii) purpose of the authority, and (iv) requirement of reporting. The AUMF 2001 allows the president to use “all necessary and appropriate force,” which gives the president vast powers to employ all resources and methods available

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113. *See id.* § 1541(c).

114. *See id.* §§ 1542–1543.

115. 50 U.S.C. § 1544(c).

116. *War Powers*, LIBR. CONGRES (Mar. 2007), <http://www.loc.gov/law/help/war-powers.php> [https://perma.cc/9CEV-GS8L].

117. *Id.*

118. *Id.*

119. *See* Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted).

120. *See id.*

121. *See, e.g.*, Bradley & Goldsmith, *supra* note 89, at 2051 (“[T]he Supreme Court has invalidated a number of [presidential wartime] acts precisely because they lacked congressional authorization.”); *Duncan v. Kahanamoka*, 327 U.S. 304, 324 (1946); *Ex Parte Mitsuye Endo*, 323 U.S. 283, 304 (1944).

122. *See* Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted).

at his discretion.<sup>123</sup> Further, it allows this use of force “against those nations, organizations, or persons, he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”<sup>124</sup> Needless to say, this phrase limits the use of force to the people who were associated with the perpetrators of the events of 9/11 attack, but includes all the associated nations, groups, and individuals involved in the attack. The AUMF 2001 defines its purpose as to “prevent any future acts of international terrorism against United States by such nations, organizations or persons.”<sup>125</sup> The AUMF 2001 obligates the president to report back to Congress every six months<sup>126</sup> to keep the required check and balance on the executive branch. Therefore, the AUMF is seen as “full congressional authorization for the President to prosecute a war” against states and nonstate actors alike that were associated with the 9/11 attacks.<sup>127</sup>

#### A. Geographical Location

The AUMF 2001 does not limit its authorization of the use of force by geographical location. Therefore, the enemy can be encountered if found anywhere in the world, including the U.S.<sup>128</sup> The AUMF includes the U.S. and all foreign territory by stating that the 9/11 attacks “render it both necessary and appropriate that the United States exercise its right to self-defense and to protect United States citizens both at home and abroad.”<sup>129</sup> The inclusion of other countries is also apparent by the fact that the AUMF refers here to the WPR, which deals mainly with the involvement of U.S. forces in foreign territory.<sup>130</sup>

#### B. Association with 9/11

Only days after the AUMF 2001, President Bush stated that the American war against terror had started with Al Qaeda, but it would not end until every

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*; see 50 U.S.C. § 1543(c) (requiring the President to “report to the Congress periodically on the status of [the use of armed forces] as well as on the scope and duration of such . . . but in no event shall he report to the Congress less often than once every six months”).

127. Bradley & Goldsmith, *supra* note 89, at 2083.

128. See *id.* at 2117 (“The text of the AUMF imposes no geographic limitation on the use of force. This distinguishes the AUMF from many prior authorizations to use force that contained geographic restrictions.”).

129. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted).

130. See Bradley & Goldsmith, *supra* note 89, at 2118.



terrorist in the world is defeated.<sup>131</sup> Bush described here a very broad, limitless, and unbounded war, which had nothing to do with the 9/11 events. Bush's stance here is a clear reflection of previous White House demands from Congress to initiate war against all terrorists, which had been rejected by Congress.<sup>132</sup> By contrast, Congress explicitly intended to limit actions to those individuals, nations, and organizations with a clear connection to the 9/11 events.<sup>133</sup>

### C. Enemy

In identifying the enemy, the AUMF 2001 extends to nonstate actors, individuals, and organizations.<sup>134</sup> At first, the White House wanted Congress to authorize the use of force to deter and preempt future attacks on the U.S.,<sup>135</sup> but Congress rejected such requests and only permitted the use of force against people associated with the 9/11 events.<sup>136</sup> Historically, the Tonkin Gulf Resolution had made this mistake by not clearly identifying the enemy, so the authorization had a wide breadth of scope.<sup>137</sup> Therefore, in the floor debates concerning the AUMF of 2001, the requirement that force is only used against those associated with 9/11 was seen as a vital limitation on the authorization.<sup>138</sup> The AUMF 2001 describes the enemy

131. Pierce Rand, *Back to the Congressional Drawing Board: Inapplicability of the AUMF to Al-Shabaab and Other New Faces of Terrorism*, 37 LOY. L.A. INT'L & COMP. L. REV. 117, 136 (2015); Bradley & Goldsmith, *supra* note 89, at 2049.

132. See Rand, *supra* note 131; GRIMMETT, *supra* note 28, at 2–3.

133. See Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted).

134. See *id.*

135. David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 72–73 (2002).

136. See John Lancaster & Helen Dewar, *Congress Clears Use of Force, \$40 Billion in Emergency Aid*, WASH. POST (Sept. 15, 2001), [https://www.washingtonpost.com/archive/politics/2001/09/15/congress-clears-use-of-force-40-billion-in-emergency-aid/d12b4d91-cb58-4562-8bed-0236ca7d4f0b/?utm\\_term=.da6f5d562f98](https://www.washingtonpost.com/archive/politics/2001/09/15/congress-clears-use-of-force-40-billion-in-emergency-aid/d12b4d91-cb58-4562-8bed-0236ca7d4f0b/?utm_term=.da6f5d562f98) [<https://perma.cc/QG6N-KV6R>]; David G. Savage, *Vietnam Ghost Haunts Senate*, L.A. TIMES (Sept. 16, 2001), <https://www.latimes.com/archives/la-xpm-2001-sep-16-mn-46434-story.html> [<https://perma.cc/V6UT-87FW>].

137. See 147 CONG. REC. 17,104 (2001) (statement of Rep. DeFazio); *id.* at 17,120 (statement of Rep. Mink); *id.* at 17,148 (statement of Rep. Jackson); *id.* at 17,145 (statement of Rep. Lee).

138. See *id.* at 17,138 (statement of Rep Cardin); *id.* at 17,041 (statement of Sen. Feingold); *id.* at 17,040 (statement of Sen. Levin); *id.* at 17,114 (statement of Rep. Norton); *id.* at 17,043 (statement of Sen. Snowe).

rather than naming it for the purposes of using force against them, and it empowers the president to determine who fits this description.<sup>139</sup> The inclusion of nations and persons is straightforward—it includes nations or persons involved in the 9/11 attacks or harboring the perpetrators of the 9/11 attacks.<sup>140</sup> But the inclusion of “organization” is a bit more convoluted for the purposes of determining such association.<sup>141</sup> Therefore, we seek to understand what organizations are included within the scope of the AUMF 2001 and what kind of association with these organizations could include a person within the scope of the AUMF 2001.<sup>142</sup> The U.S. Department of Defense defined an enemy in this regard for the purposes of Guantanamo detainees as, “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>143</sup> This, particularly the inclusion of coalition members, exorbitantly widens the scope of AUMF 2001 because it includes organizations that had nothing to do with the U.S., Al Qaeda, or the 9/11 events.<sup>144</sup>

### *1. Terrorist Organizations*

The AUMF covers Al Qaeda (a terrorist organization) because the organization took direct responsibility for the 9/11 attacks.<sup>145</sup> This includes all present and future members of Al Qaeda regardless of their individual non-association because these members are impliedly associated with the 9/11 attacks.<sup>146</sup> Therefore, arguably all organizations that are agents of Al Qaeda, participate with it in the war against the U.S., provide assistance against the U.S., or harbor Al Qaeda come under the scope of the AUMF 2001.<sup>147</sup>

The AUMF 2001 also includes all organizations that aided, abetted, or harbored Al Qaeda members in relation to the 9/11 attacks.<sup>148</sup> For example, the Taliban also comes under the AUMF 2001 under the term “associated forces” because it harbored Al Qaeda.<sup>149</sup> This is discussed in the next

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139. See Bradley & Goldsmith, *supra* note 89, at 2082–83.

140. See Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2(a) (2001) (enacted).

141. See Bradley & Goldsmith, *supra* note 89, at 2107–08.

142. See Bradley & Goldsmith, *supra* note 89, at 2108.

143. Memorandum from the Deputy Sec’y of Def. to the Sec’y of the Navy (July 7, 2004).

144. See Rand, *supra* note 131, at 148.

145. 143 DOUGLAS LOVELACE, JR., *THE EVOLUTION OF THE ISLAMIC STATE* 153 (2016).

146. See Bradley & Goldsmith, *supra* note 89, at 2109.

147. *Id.* at 2113.

148. LOVELACE, *supra* note 145, at 153.

149. *Id.*

subsection, along with the criteria for harboring under the AUMF.<sup>150</sup> Similarly, future Al Qaeda members, such as those who had nothing to do with the 9/11 attacks, also come within the scope of the AUMF 2001. Additionally, future organizations that associate themselves with Al Qaeda and had nothing to do with the 9/11 attacks will come within the scope of the AUMF 2001 because they impliedly associate themselves with the 9/11 attacks and Al Qaeda's war against the U.S. through their association with Al Qaeda.<sup>151</sup>

## 2. Associated Forces

Contrary to this executive stance, scholars, such as Pierce Rand, argue that organizations that may have been associated with Al Qaeda but had nothing to do with the 9/11 events do not come within the scope of AUMF 2001.<sup>152</sup> This is because the sole limitation by Congress's use of force is through the identification of the enemy as having an "association with the events of 9/11," which is avoided by the executive branch to justify its unbounded war on terror.<sup>153</sup> Congress also identified this presidential avoidance of the 9/11 association limitation by introducing unbounded war through the "associated forces" reasoning.<sup>154</sup> Congress tried to rectify the presidential stance in proposed section 1034 of the National Defense Authorization Act.<sup>155</sup> However, the section was removed from the Bill owing to the threat of veto from the president and his stance against the section.<sup>156</sup> Rand argues that the AUMF 2001 specifically used the past tense in "planned, authorized, committed, or aided, or harbored" to limit the enemy to the perpetrators.<sup>157</sup> He adds that the AUMF 2001's scope has

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150. See *infra* Section II.E.

151. See Bradley & Goldsmith, *supra* note 89, at 2110.

152. See Rand, *supra* note 131, at 149–51.

153. See 147 CONG. REC. 17,138 (2001) (statement of Rep. Cardin); *id.* at 17,041 (statement of Sen. Feingold); *id.* at 17,040 (statement of Sen. Levin); *id.* at 17,114 (statement of Rep. Norton); *id.* at 17,043 (statement of Sen. Snowe); Rand, *supra* note 131, at 149–51.

154. See 147 CONG. REC. 17,047 (2001) (statement of Sen. Biden); *id.* at 17,122 (statement of Rep. Spratt).

155. See Rand, *supra* note 131, at 149–51; National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1034, 125 Stat. 1298 (2011) (enacted).

156. Chris Anders, *Obama White House Threatens a Veto Over Worldwide War and Detention Provisions*, ACLU BLOG RIGHTS (May 24, 2011, 9:03 PM), <https://www.aclu.org/blog/national-security/obama-white-house-threatens-veto-over-worldwide-war-and-detention-provisions> [<https://perma.cc/8Z6J-YJZJ>]; see also National Defense Authorization Act § 1034.

157. See Rand, *supra* note 131, at 134.

evolved and outgrown its real objectives to justify a war against all sorts of Islamic terrorism, which has ostensibly been taken to mean “associated forces.”<sup>158</sup> This has happened mainly after the term “associated forces” was introduced into the scope of the AUMF 2001 through the definition of “enemy combatant” in the Combatant Status Review Tribunal (CSRT),<sup>159</sup> which is absent from the original text of the resolution.<sup>160</sup> Rand concludes that terrorist organization Al-Shabaab, regardless of its support for Al Qaeda,<sup>161</sup> does not come under the scope of the AUMF 2001.<sup>162</sup>

Nevertheless, the term “associated forces,” and therefore the association with Al Qaeda, has been legislatively endorsed by Congress in the Military Commission Act of 2006<sup>163</sup> and the National Defense Authorization Act of 2012.<sup>164</sup> The D.C. court also confirmed in the 2009 *Hamli v. Obama* case, that enemy combatants include Al Qaeda, the Taliban, and their associate forces.<sup>165</sup> According to the U.S. Department of Defense “associate forces” are defined “as having two characteristics: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.”<sup>166</sup> Later, Obama also endorsed the inclusion of “associated forces” in the list of enemy combatants under the AUMF 2001.<sup>167</sup>

Despite the definitions, it is still unclear what organizations are covered by the term “associated forces” within the scope of the AUMF 2001 because the executive branch has refused to publicize the list of groups covered by associated forces, for fear of inflating recruitment in these groups by doing so.<sup>168</sup> As such, there is a complete lack of transparency in identifying

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158. *Id.* at 134–35.

159. *Id.* at 138.

160. Lauren Harper, *Want to Know Who the US is at War with? Too Bad, Says Pentagon*, NAT'L SECURITY ARCHIVE (Sept. 4, 2013), <https://unredacted.com/2013/09/04/want-to-know-who-the-us-is-at-war-with-too-bad-says-pentagon/> [<https://perma.cc/22YR-MEXE>]; see also Rand, *supra* note 131, at 135.

161. See Rand, *supra* note 131, at 147.

162. *Id.* at 149–51.

163. Military Commissions Act of 2006, S. 3930, 109th Cong. § 948(a) (2006) (enacted).

164. National Defense Authorization Act for Fiscal Year 2012, H.R. Res. 1540, 112th Cong. § 1034 (2011) (enacted).

165. *Hamli v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009).

166. Jeh Johnson, Gen. Counsel of the Dep't of Def., Oxford Union, Speech at Oxford University: The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012), <https://www.lawfareblog.com/jeh-johnson-speech-oxford-union> [<https://perma.cc/8RYY-BQNA>].

167. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<https://perma.cc/5A3A-Z4LK>].

168. Cora Currier, *Who are We at War With? That's Classified*, PROPUBLICA (Jul. 26, 2013, 10:13 AM), <https://www.propublica.org/article/who-are-we-at-war-with-thats-classified> [<https://perma.cc/9L9P-QYUE>].

whether terrorist organizations such as Al Nusra Front, Al-Shabaab, and Islamic Maghreb are covered or not as associated or affiliated forces of Al Qaeda, and as a result whether they come under the scope of the AUMF 2001.<sup>169</sup> Presently, the list of covered organizations is classified.<sup>170</sup>

#### D. ISIS

The Obama administration used the AUMF 2001 as a justification to launch attacks against ISIS.<sup>171</sup> But the grounds for the validity of these actions are shaky, mainly because Congress did not approve these actions and the administration relied on the AUMF 2001 for its justification.<sup>172</sup> President Obama stretched the meaning and scope of AUMF 2001 by including ISIS.<sup>173</sup> President Obama also declared that he wished to repeal AUMF 2001, which his administration used to justify its actions against ISIS.<sup>174</sup> By doing so, the Obama administration changed the interpretation of the AUMF in 2001.<sup>175</sup>

The Obama administration based its targeting of ISIS on the relationship between ISIS and Al Qaeda.<sup>176</sup> Certainly, there was once some relationship

169. See *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the Comm. on Armed Services*, 113th Cong. 18–19 (2013) (statement of Sen. John McCain); *id.* at 27–28 (statement of Sen. Angus King); Daskal & Vladeck, *supra* note 88, at 124.

170. See *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the Comm. on Armed Services*, *supra* note 169, at 12–13, 30 (statement of Michael A. Sheehan, Assistant Secretary of Defense for Special Operations and Low Intensity Conflict); see also Rand, *supra* note 131, at 135.

171. See Wagner, *supra* note 14, at 248; see also Letter from President Barack Obama to Cong. of the U.S. on Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant (Feb. 11, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [<https://perma.cc/5FSB-YK2Y>].

172. See Wagner, *supra* note 14, at 247.

173. *Id.* at 252.

174. Press Release, Office of the Press Sec'y, Remarks by the President at the National Defense University (May 23, 2013) (on file with author); see also Press Release, Office of the Press Sec'y, Press Briefing by Press Secretary Josh Earnest (Sept. 11, 2014) (on file with author).

175. William S. Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 38 HARV. J. L. & PUB. POL'Y 509, 523–31 (2015).

176. Zeke J. Miller, *White House: Iraq War Vote: Obama Opposed Could Be Used for ISIS Strikes*, TIME (Sept. 13, 2014), <http://time.com/3362683/obama-isis-iraq-syria-war-aumf/> [<https://perma.cc/VS6K-2Q43>]; see also Wagner, *supra* note 14, at 255.

between the two, but that relationship ended when Al Qaeda disassociated itself from ISIS in 2014<sup>177</sup> and shunned its actions.<sup>178</sup> Since then, both organizations have been at war with each other. This raises the question: did the AUMF 2001 authorize the use of force against the same organization or not? Gregory A. Wagner argues that, owing to these shaky ties between Al Qaeda and ISIS, the U.S. must not enter into a long conflict by involving U.S. forces without first debating it with Congress and acquiring new authorization.<sup>179</sup> Despite Obama's claims to expand and use AUMF 2001's mandate against ISIS,<sup>180</sup> and the reliance on independent presidential powers and AUMF 2001 and 2002,<sup>181</sup> the administration formally asked Congress for authorization of the use of force against ISIS in 2015.<sup>182</sup>

In the 2016 Legal Framework Report on Use of Military Force, President Obama clarified his legal position on the administration's use of force against ISIS, which includes "airstrikes, military advising, training of Iraqi security forces and Syrian rebel groups, and military activities of United States special operations forces in Iraq, Syria and Libya."<sup>183</sup> Rather than relying on independent presidential powers, the report argues that AUMF 2001 authorizes the use of force against ISIS in Iraq, Syria, and Libya.<sup>184</sup> It further argues that AUMF's provision to "prevent any future acts of international terrorism against the United States"<sup>185</sup> by those who were involved in the 9/11 events, allows such use of force against ISIS.<sup>186</sup> The report claims the co-belligerence of ISIS with Al Qaeda links ISIS to the 9/11 events, regardless of the claims of dissociation by the two organizations.<sup>187</sup> The report also partly relies on the implied congressional approval of these

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177. Liz Sly, *Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST. (Feb. 3, 2014), [https://www.washingtonpost.com/world/middle-east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1\\_story.html?utm\\_term=.73b9e9adb8fd](https://www.washingtonpost.com/world/middle-east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html?utm_term=.73b9e9adb8fd) [https://perma.cc/M7ZD-ZW27].

178. See Sly, *supra* note 177.

179. See Wagner, *supra* note 14, at 256.

180. Curtis A. Bradley, & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628 (2016)); see also Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn't Necessary*, N.Y. TIMES (Sept. 10, 2014), <https://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html> [https://perma.cc/E2UV-8NA].

181. See WEED, *supra* note 19, at 1.

182. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015).

183. See REPORT, *supra* note 11.

184. *Id.*

185. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2(a) (2001) (enacted).

186. See REPORT, *supra* note 11.

187. *Id.*

military actions by showing that Congress did support the same military actions and campaigns against ISIS in Iraq and Syria through funding.<sup>188</sup>

### *E. Duration*

The AUMF 2001 does not put any limit on the duration of the conflict or on its authorization to the president to use force.<sup>189</sup> The floor debates in Congress also do not show any intention to limit the authorization by time; instead, Congress was aware that this would surely take a long time.<sup>190</sup> Senator Joe Biden supported the fact that the AUMF 2001 poses no time limitations.<sup>191</sup> That is why Congress did not include any sunset clause in the AUMF 2001. Seemingly, the AUMF authorizes the unlimited use of force unbound by any time limits,<sup>192</sup> but it is limited to the perpetrators of 9/11 and their associates.<sup>193</sup> Some scholars such as Pierce Rand and Jennifer Daskal argue that, since Al Qaeda has been crippled after the death of Osama bin Laden, the end of the Taliban regime in Afghanistan, the capture and death of the masterminds of 9/11, and its military decimation,<sup>194</sup> the AUMF must automatically cease to function.<sup>195</sup> Former U.S. Secretary of Defense, Leon Panetta, also noted the same: that the perpetrators of 9/11 did not pose threat to the U.S. any longer.<sup>196</sup> Similarly, Jeh Johnson, the former General Counsel of the Defense Department, explained in 2012 that, owing to decimation of Al Qaeda, the U.S. “should no longer be considered [to be in] an armed conflict with Al Qaeda and its Associate

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188. *See id.*; *see also* WEED, *supra* note 19, at 3.

189. *See* Bradley & Goldsmith, *supra* note 89, at 2123.

190. *See* 147 CONG. REC. 17,111 (2001) (statement of Rep. Hastert); *id.* at 17,112 (statement of Rep. Lantos); *id.* at 17,120 (statement of Rep. DeLay); *id.* at 17,047 (statement of Sen. Biden).

191. *Id.* at 17,047 (statement of Sen. Biden).

192. *See* Daskal & Vladeck, *supra* note 88, at 125.

193. Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL. (May 23, 2010), <https://www.cfr.org/background/targeted-killings> [<https://perma.cc/YTF7-2R9U>].

194. *See* Daskal & Vladeck, *supra* note 88, at 116.

195. *See* Rand, *supra* note 131, at 142.

196. Leon Panetta, U.S. Sec’y of Defense, Defense Priorities & Counterterrorism, Speech Before the Center for a New American Security (Nov. 20, 2012).

forces.”<sup>197</sup> Likewise, Obama agreed that the AUMF 2001’s mandate must not be expanded any further.<sup>198</sup>

Other relatively newer organizations such as ISIS present threats to the U.S. and its citizens.<sup>199</sup> Despite this clear exhaustion of the AUMF 2001, in 2014 Obama expanded the mandate of the AUMF 2001 to use force against ISIS.<sup>200</sup> However, in 2014, Al Qaeda publicly dissociated itself from ISIS.<sup>201</sup> Interestingly, the AUMF does not authorize the use of force against future terrorist threats against the U.S. that are not associated with 9/11.<sup>202</sup> In fact, Congress explicitly rejected requests for authorization to use force against any future threats.<sup>203</sup> Therefore, if there is a new threat to the U.S. by a newly emergent organization of terrorists, the executive branch must acquire new authorization from Congress for the use of force against such a group.<sup>204</sup>

As a result, there have been numerous proposals and calls for a new authorization to use force against the threats posed by terrorist organizations that had nothing to do with the 9/11 events and are not associated with its perpetrators.<sup>205</sup> Even President Obama, an advocate of independent presidential war powers who had also interpreted the AUMF 2001 most broadly, asked Congress to approve the use of military force against ISIS.<sup>206</sup> Despite Obama’s claims to expand and use the AUMF 2001’s mandate against

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197. Jeh Johnson, Gen. Counsel, U.S. Dep’t of Def., Speech at Oxford Union: The Conflict Against Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012); *see also* Bradley & Goldsmith, *supra* note 180, at 19.

198. Press Release, White House Office of the Press Sec’y, Remarks by the President at the National Defense University (May 23, 2013) (on file with author); *see also* Bradley & Goldsmith, *supra* note 180, at 19.

199. *See* Daskal & Vladeck, *supra* note 88, at 117.

200. *See* Savage, *supra* note 180; *see also* Bradley & Goldsmith, *supra* note 180, at 19.

201. *See* Sly, *supra* note 177.

202. *See* GRIMMETT, *supra* note 28, at 2; *see also* Rand, *supra* note 131, at 135.

203. David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73 (2002).

204. *See* Daskal & Vladeck, *supra* note 88, at 126.

205. *See* Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015); *see also* S.J. Res. 47, 113th Cong. (2014); *see also* H.R.J. Res. 27, 114th Cong. (2015); *see also* H.R.J. Res. 33, 114th Cong. § 2 (2015); *see also* S. Res. 1587, 114th Cong. §§ 3, 8 (2015); *see also* H.R. Res. 4208, 114th Cong. § 3 (2015); *see also* S.J. Res. 26, 114th Cong. (2015); *see also* S.J. Res. 29, 114th Cong. (2016).

206. *See* Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015).



ISIS,<sup>207</sup> the administration formally asked Congress for authorization to use force against ISIS in 2015.<sup>208</sup>

### III. THE AUMF 2002

The AUMF 2002 empowers the president to be able to use force against Iraq in order to enforce relevant Security Council resolutions and “defend the national security of the United States against the continuing threat posed by Iraq.”<sup>209</sup> This authorization led to the U.S. invasion of Iraq, and subsequently the decline and fall of Saddam Hussein, under the false pretext of the possession and intention to use weapons of mass destruction.<sup>210</sup> Formally, the AUMF had no sunset clause in it. But, arguably, after the restoration of Iraq as a sovereign state, the removal of Saddam, and the withdrawal of U.S. forces, the AUMF 2002 is no longer enforceable.<sup>211</sup> However, the Obama administration expansively relied on the AUMF 2002 for its actions against ISIS in Iraq and Syria.<sup>212</sup>

### IV. NEW AUMF: PROPOSALS AND COUNTER-PROPOSALS

President Obama ordered air strikes against ISIS in Iraq and Syria in 2014 and 2015. The president also ordered military deployments against ISIS in Iraq and Syria.<sup>213</sup> These deployments against ISIS were increased by the US in 2016.<sup>214</sup> Obama relied on the 2001 and 2002 AUMFs for the legal validity of his actions in Iraq, Syria, and Libya.<sup>215</sup> As a result, several congressmen questioned the independent presidential authority or any authority to be able to fight ISIS without Congress’s approval.<sup>216</sup> In the 113th, 114th, and 115th sessions of Congress, there were discussions on the proposals

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207. See REPORT, *supra* note 11; Savage, *supra* note 180; Bradley & Goldsmith, *supra* note 180, at 19.

208. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015).

209. See Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3(a)(1) (2002) (enacted).

210. See Fisher, *supra* note 38, at 268.

211. See WEED, *supra* note 19, at 2–3.

212. See REPORT, *supra* note 11; WEED, *supra* note 19, at 2–3.

213. WEED, *supra* note 19, at 1.

214. *Id.*

215. See REPORT, *supra* note 11; see also WEED, *supra* note 19, at 4.

216. See WEED, *supra* note 19, at 3–4.

to require or acquire a new AUMF against ISIS by the president and Congress.<sup>217</sup> In 2015, President Obama sent his own proposal for a new AUMF against ISIS to Congress.<sup>218</sup> Furthermore, there have been several proposals for a new AUMF in Congress and proposals to repeal the existing AUMFs without introducing a new one.<sup>219</sup> However, despite numerous calls for a new AUMF against ISIS by Congress and the president, to this date (September 2018), no new AUMF proposal against ISIS has been successfully passed by Congress, and every proposal had been rejected for one reason or another.<sup>220</sup>

#### *A. Proposals for a New AUMF*

The first proposal was presented by Senate Foreign Relations Committee chairman Robert Menendez in 2014. This sought authorization to use force against ISIS, with a sunset clause of three years and the repeal of AUMF 2001.<sup>221</sup> Secretary of State John Kerry remarked that such authorization was not flexible enough to allow the U.S. president to efficiently fight ISIS, owing to its sunset clause.<sup>222</sup> The second proposal was presented by Congressman Adam Schiff in 2015. This proposal allowed the use of force against ISIS but limited the use to Syria and Iraq with no ground forces, except for special operations forces.<sup>223</sup> The proposal also had a sunset clause of three years and would have repealed AUMFs 2001 and 2002 on its enactment.<sup>224</sup> The third proposal was presented by Congressman Adam Kinzinger in 2015. This proposal allowed the use of force against ISIS and its associated forces, including its successors and closely related organizations.<sup>225</sup> It demanded presidential reports every three months and the revocation of

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217. See generally WEED, *supra* note 19.

218. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015); see also WEED, *supra* note 19, at summary.

219. See generally WEED, *supra* note 19.

220. See generally WEED, *supra* note 19.

221. S.J. Res. 47, 113th Cong. (as proposed by S. Comm. on Foreign Relations, Dec. 13, 2014).

222. S.J. Res. 47, 113th Cong. pt. VIII (Sec’y of State John Kerry rejecting the proposal to impose time limits on an authorization for the use of force on the President because it would “preemptively bind the hands” of the President).

223. Draft Proposal from Rep. Adam Schiff to Congress: Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant, H.J. Res. 27, 114th Cong. (2015).

224. Draft Proposal from Rep. Adam Schiff to Congress: Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant, H.J. Res. 27, 114th Cong. § 2 (2015); see also WEED, *supra* note 19, at 5.

225. Proposal from Rep. Adam Kinzinger to Congress: Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant, H.J. Res. 33, 114th Cong. (2015).

the 2002 AUMF.<sup>226</sup> The fourth and fifth (identical) proposals were presented by Senators Tim Kaine and Jeff Flake and Congressmen Scott Rigell and Peter Welch in 2015.<sup>227</sup> These proposals allowed the necessary and appropriate use of force against ISIS and its associated forces.<sup>228</sup> They opposed the involvement of ground troops, introduced a sunset clause of three years, and also demanded the revocation of the 2002 AUMF.<sup>229</sup> The sixth proposal was presented by Senator Lindsey Graham in 2015. This proposal authorized the president to use all necessary force against ISIS and its associated forces and successors, free from any limitations or qualifying conditions.<sup>230</sup> The seventh proposal was presented by Congressman Schiff in 2015. This proposal allowed the use of appropriate force against ISIS, Al Qaeda, the Taliban, and their associated forces and cobelligerents.<sup>231</sup> After enactment, this proposal would have repealed both the 2001 and 2002 AUMFs.<sup>232</sup> It had a sunset clause of three years, and it demanded reports from the president for Congress.<sup>233</sup> This included a list of targeted organizations in a federal register, along with the reasons for including them, and a list of U.S. forces deployments.<sup>234</sup> The eighth proposal was presented by Senator Mitch

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226. H.J. Res. 33 § 3, 114th Cong. (2015); *see also* WEED, *supra* note 19, at 5–6.

227. Proposal from Sen. Tim Kaine & Sen. Jeff Flake: Authority for the Use of Military Force Against the Islamic State of Iraq and the Levant, S. 1587, 114th Cong. (2015); Proposal from Rep. Scott Rigell & Rep. Peter Welch: Authority for the Use of Military Force Against the Islamic State of Iraq and the Levant, H.R. 4208, 114th Cong. (2015); WEED, *supra* note 19, at 6.

228. S. 1587, 114th Cong. § 3 (2015); H.R. 4208, 114th Cong. § 3 (2015); WEED, *supra* note 19, at 6.

229. S. 1587, 114th Cong. §§ 3, 4, 7 (2015); H.R. 4208, 114th Cong. §§ 3, 4, 7 (2015); WEED, *supra* note 19, at 6.

230. Proposal from Sen. Lindsey Graham: Authorization for the Use of Force Against the Islamic State of Iraq and the Levant and its Associated Forces, S.J. Res. 26, 114th Cong. § 2 (2015); *see also* WEED, *supra* note 19, at 6.

231. Draft Proposal from Rep. Adam Schiff: Consolidated Authorization for the Use of Military Force Resolution of 2015, H.J. Res., 114th Cong. § 2(a)(1) (2015), [https://www.justsecurity.org/wp-content/uploads/2015/12/SCHIFF\\_023\\_xml.pdf](https://www.justsecurity.org/wp-content/uploads/2015/12/SCHIFF_023_xml.pdf) [<https://perma.cc/2HTW-T8H7>]; *see also* WEED, *supra* note 19, at 6–7.

232. Draft Proposal from Rep. Adam Schiff: Consolidated Authorization for the Use of Military Force Resolution of 2015, H.J. Res., 114th Cong. § 4(1), (2); *see also* WEED, *supra* note 19, at 6–7.

233. Draft Proposal from Rep. Adam Schiff: Consolidated Authorization for the Use of Military Force Resolution of 2015, H.J. Res., 114th Cong. §§ 2(b), 3; *see also* WEED, *supra* note 19, at 6–7.

234. Draft Proposal from Rep. Adam Schiff: Consolidated Authorization for the Use of Military Force Resolution of 2015, H.J. Res., 114th Cong. § 3(a)(1), (c)(1); *see also* WEED, *supra* note 19, at 6–7.

McConnell in 2016. This proposal authorized the use of appropriate force against ISIS and its associated forces and successors.<sup>235</sup> Similarly, the ninth proposal was presented by Congressman Scott Perry in 2016. This proposal authorized the use of force against several known terrorist organizations, including ISIS.<sup>236</sup> The tenth proposal was presented by Congressman Adam Kinzinger in 2017 and was known as H.J. Res. 63. This proposal authorized the use of appropriate force against ISIS, its associated forces, and its successors.<sup>237</sup> It required the president to report to Congress every three months and repeal the AUMF 2002.<sup>238</sup> The eleventh proposal was presented by President Obama in 2015. This proposal authorized the use of appropriate force against ISIS, its associated forces, and its successors.<sup>239</sup> This authorization did not include the use of ground forces and had a sunset clause of three years, which demanded revocation of AUMF 2002.<sup>240</sup> It also required the president to report to Congress every six months.<sup>241</sup>

### *B. Proposals to Repeal or Limit the Existing AUMFs*

In addition to proposals for a new AUMF against ISIS, there have been several senators and congressmen who have opposed the proposals for a new AUMF against ISIS, instead proposing and advocating revocation of or limitations to the existing AUMF. The first proposal was presented by Congresswoman Barbara Lee in 2015. This proposal called for the repeal of both the 2001 and 2002 AUMFs without introducing a new AUMF targeting ISIS.<sup>242</sup> Instead it placed additional requirements on the president to report

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235. Proposal from Sen. Mitch McConnell: Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant and its Associated Forces, S.J. Res. 29, 114th Cong. § 2(a) (2016); *see also* WEED, *supra* note 19, at 7.

236. Draft Proposal from Rep. Scott Perry: Authorization for Use of Military Force Against Islamist Extremism, H.J. Res., 114th Cong. § 2 (2016); *see also* WEED, *supra* note 19, at 7.

237. Proposal from Rep. Adam Kinzinger: Authorization for Use of Military Force against the Islamic State of Iraq and the Levant, H.R.J. Res. 63, 115th Cong. § 2 (2017); *see also* WEED, *supra* note 19, at 8–9.

238. H.R.J. Res. 63, 115th Cong. § 3 (2017); *see also* WEED, *supra* note 19, at 8–9.

239. Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. § 2 (2015); *see also* WEED, *supra* note 19, at 9–10.

240. Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. § 3 (2015); *see also* WEED, *supra* note 19, at 9–10.

241. Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. § 4 (2015); *see also* WEED, *supra* note 19, at 9–10.

242. Proposal from Rep. Barbara Lee: Comprehensive Solution to ISIL Resolution, H. J. Res. 30, 114th Cong. § 6 (2015); *see also* WEED, *supra* note 19, at 7.

to Congress every 90 days about strategies to dismantle ISIS through nonmilitary activities.<sup>243</sup> The second proposal was presented by Senator Ben Cardin in 2015 and demanded revocation of the AUMF 2001.<sup>244</sup> The third proposal was presented by Congresswoman Barbara Lee in 2015 in the shape of two separate Bills. This proposal proposed to repeal the AUMF 2001 and the AUMF 2002 on the grounds that they were being used to justify a never-ending war, which was inconsistent with the congressional powers to declare war.<sup>245</sup> Congresswoman Lee also sought prohibition on the use, abuse, and exploitations of funds regarding AUMF 2001 and AUMF 2002, which would have stopped the use of funds in the fight against ISIS.<sup>246</sup> The third proposal was presented by Congressman James McGovern in 2017. Like Lee's proposals, McGovern also sought the prohibition on the use of funds used in the fight against ISIS.<sup>247</sup>

Furthermore, pursuant to the WPR, Congress, in the concurrent resolution presented by Congressmen Jim McGovern, Walter Jones, and Barbara Lee in 2015, demanded that president remove the forces deployed in Iraq and

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243. H.J. Res. 30, 114th Cong. § 3 (2015); *see also* WEED, *supra* note 19, at 7.

244. Proposal from Sen. Benjamin Cardin: Sunset of the 2001 Authorization for Use of Military Force, S. 526, 114th Cong. § 3 (2015).

245. Proposal from Rep. Barbara Lee: Repeal of the Authorization for Use of Military Force, H.R. 1303, 114th Cong. §§ 2, 3 (2015); Proposal from Rep. Barbara Lee, H.R. 1304, 114th Cong. (2015).

246. *See* Proposal from Rep. Barbara Lee: Amendment to the Department of Defense Appropriations Act, H.Amdt. 482 to H.R. 2685, 114th Cong. (2015); *see* Proposal from Rep. Barbara Lee: Amendment to the Department of Defense Appropriations Act, H.Amdt. 484 to H.R. 2685; *see* Proposal from Rep. Barbara Lee: Amendment to the Department of Defense Appropriations Act, H.Amdt. 1216 to H.R. 5293, 114th Cong. (2016); *see also* 161 CONG. REC. H4116-18 (daily ed., June 10, 2015) (statement of Rep. Lee) for a discussion regarding an amendment to Department of Defense Appropriations Act to prohibit the use of funds to be obligated or expended pursuant to the AUMF; *see also* 162 CONG. REC. H3929-30 (daily ed. June 16, 2016) (statement of Rep. Lee) for a discussion regarding an amendment to the Department of Defense Appropriations Act requiring the presence of a new ISIL-specific AUMF and to prohibit the use of funds for the 2001 AUMF; *see also* WEED, *supra* note 19, at 7–8.

247. *See* Proposal from Rep. James McGovern: Amendment to the Department of Defense Appropriations Act, H.Amdt. 1215 to H.R. 5293, 114th Cong. (2016); *see also* 162 CONG. REC. H3928 (daily ed. June 16, 2016) (statement of Rep. McGovern) for a discussion regarding an amendment to Department of Defense Appropriations Act to prohibit funds being obligated for combat operations in Iraq or Syria unless an AUMF is enacted; *see also* WEED, *supra* note 19, at 7–8.

Syria against ISIS, as required by Section 5(c) of the WPR.<sup>248</sup> But, the resolution failed to pass by 139–288 votes.<sup>249</sup>

### C. *Scope of the New AUMF*

The new AUMF proposals against ISIS generally include sunset clauses of three years, the identification of enemy as ISIS, its cobelligerents, its successors, and its associated forces, the revocation of AUMF 2001 and AUMF 2002, and a reporting requirement on the president toward Congress.<sup>250</sup> If approved, the new AUMF would widen the scope of the U.S.’s global use of force against terrorism, because the terms “cobelligerents” and “associated forces” have been controversially abused in the past. So, it is very likely it will continue in the future. But, the sunset clauses in the new AUMF and repealing the provisions for previous AUMFs<sup>251</sup> will ensure that the new AUMF is not extensively abused and used as a justification for unending wars. However, senators have criticized a new AUMF to fight ISIS by arguing that since there has been no sustained armed attack that can justify the U.S.’s actions against ISIS or its deployment of forces in Syria and Iraq, the U.S. is not at war with ISIS and therefore does not need a new AUMF.<sup>252</sup>

### V. NO NEED FOR A NEW AUMF

Jennifer Daskal argues that calls for a new AUMF are unnecessary, unwise, and provocative, since we should be seeking out peace rather than open-ended<sup>253</sup> war, for five reasons.<sup>254</sup> First, the U.S. presidential authority to counter a threat in self-defense is fully capable of thwarting any threats posed by ISIS.<sup>255</sup> Second, cooperation among states to fight terrorism has proven to be a more efficient way to counter threats posed by terrorist

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248. Proposal from Rep. James McGovern: Removal of U.S. Armed Forces deployed to Iraq or Syria, other than Armed Forces Required to Protect United States diplomatic Facilities and Personnel, from Iraq and Syria, H.R. Con. Res. 55, 114th Cong. (2015); *see also* WEED, *supra* note 19, at 8.

249. *See* WEED, *supra* note 19, at 8.

250. *See* Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. § 2 (2015); *see also* S.J. Res. 47, 113th Cong. (2014); H.R.J. Res. 27, 114th Cong. (2015); H.R.J. Res. 33, 114th Cong. § 2 (2015); S. Res. 1587, 114th Cong. §§ 3, 8 (2015); H.R. Res. 4208, 114th Cong. § 3 (2015); S.J. Res. 26, 114th Cong. (2015); S.J. Res. 29, 114th Cong. (2016).

251. *Id.*

252. *See* Daskal & Vladeck, *supra* note 88, at 127.

253. *Id.* at 119, 127.

254. *Id.* at 119, 127.

255. *Id.* at 127.

organizations.<sup>256</sup> Third, the threat posed by new organizations such as ISIS does not equate to an armed conflict since there has been no armed attack like 9/11 by ISIS or similar organizations.<sup>257</sup> Fourth, if an armed conflict is declared or sustained because of an armed attack or a declaration, then Congress can easily pass a resolution to fight such an identified group when required, as it did after the 9/11 events.<sup>258</sup> Fifth, the expansive way of fighting unending wars is inefficiently counterproductive<sup>259</sup> and increases, rather than eradicates, the threats posed by terrorists.<sup>260</sup> Instead, this way of war destabilizes regions and increases terrorism by defining terrorists broadly<sup>261</sup> and by making illegitimate drone strikes.<sup>262</sup> Terrorist organizations do pose a threat to the U.S. But it is not the kind of threat posed by Al Qaeda and linked to the 9/11 events. Obama noted that the U.S. cannot end its war on terrorism.<sup>263</sup> Thus, it is only unwise to authorize open-ended war powers for threats posed by these organizations without public debate.<sup>264</sup>

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256. *Id.* at 127.

257. *Id.*

258. *Id.* at 127–28.

259. See *Drone Wars: The Constitutional and Counterterrorism implications of Targeted Killings: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Rosa Brooks, Professor of Law, Georgetown University Law Center); Dennis Blair, Opinion, *Drones Alone Are Not the Answer*, N.Y. TIMES (Aug. 14, 2011), <https://www.nytimes.com/2011/08/15/opinion/drones-alone-are-not-the-answer.html> [https://perma.cc/8J4L-9436]; U.S. DEP'T OF ARMY, COUNTERINSURGENCY paras. 1-128, 1-129 (Field Manual no. 3-24, 2006); Daskal & Vladeck, *supra* note 88, at 139–40.

260. See Daskal & Vladeck, *supra* note 88, at 127–28.

261. John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Harvard Law School Program on Law & Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011), <https://www.hoover.org/sites/default/files/pages/docs/speaking-the-law-appendices.pdf> [https://perma.cc/SDL9-AUZ6].

262. Hoglar Stark, *Drone Killing Debate: Germany limits Information Exchange with US Intelligence*, DER SPIEGEL (May 17, 2011), <http://www.spiegel.de/international/germany/drone-killing-debate-germany-limits-information-exchange-with-us-intelligence-a-762873.html> [https://perma.cc/HP8Q-HZVP]; see Daskal & Vladeck, *supra* note 88, at 140–41.

263. *Id.* at 128–29.

264. *Id.*

## VI. INTERNATIONAL LAW

The international law of using force allows the use of force in self-defense<sup>265</sup> only against a sustained<sup>266</sup> and large-armed attack,<sup>267</sup> and does not allow the preemptive use of force against mere threats.<sup>268</sup> In the fight against ISIS, the U.S. has not sustained a large armed attack by ISIS; rather, it poses a future threat to the U.S.<sup>269</sup> The international law of using force also denies the right to self-defense against non-state actors residing in neutral states.<sup>270</sup> Moreover, the principles of proportionality, distinction,<sup>271</sup> and necessity<sup>272</sup> oblige that the reactionary use of force must be necessary and proportional.<sup>273</sup> However, the aggression in the shape of the seventeen years of war against terrorism, coupled with the proposals for possibly a new unending war authorization, is neither necessary nor proportional: all other peaceful ways of ending the conflicts have not been exhausted. Similarly, the (1) seventeen years of war, (2) use of more than a trillion dollars of military funds,<sup>274</sup> (3) devastation of several countries without distinguishing between civilian targets,<sup>275</sup> (4) training of rebels,<sup>276</sup> and (5) subsequent destabilization of regions counterproductively increased, rather than eradicated, terrorism,<sup>277</sup> and it is not at all proportional with the catastrophe of the 9/11 events or the threat posed to the U.S. by these organizations.

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265. See U.N. Charter art. 51.

266. ANDERS HENRIKSEN, *INTERNATIONAL LAW* 273 (OUP, 2017).

267. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 116, ¶¶ 144–47 (Dec. 19).

268. See Daskal & Vladeck, *supra* note 88, at 128–29.

269. See REPORT, *supra* note 11.

270. *Military and Paramilitary Activities in and Against Nicaragua (Nicar.) v. U.S.*, Judgment, 1986 I.C.J. Rep. 14, ¶ 55 (June 27).

271. Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; see also GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 285 (CUP, 2010).

272. Geneva Protocol I, *supra* note 270, art. 8.

273. See *id.*; see also Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; see also GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 285 (CUP, 2010).

274. AMY BELASCO, CONG. RESEARCH SERV., RL33110, *COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11* 8 (2011).

275. MELVIN A. GOODMAN, *NATIONAL INSECURITY: THE COST OF AMERICAN MILITARISM* 5 (2013).

276. David E. Sanger, Eric Schmitt & Ben Hubbard, *Trump Ends Covert Aid to Syrian Rebels Trying to Topple Assad*, N.Y. TIMES (Jul. 19, 2017), <https://www.nytimes.com/2017/07/19/world/middleeast/cia-arming-syrian-rebels.html> [https://perma.cc/SGM7-V7JD].

277. See DORRIEN, *supra* note 7, at 227.



## CONCLUSION

The U.S. President and Congress are wrongly dichotomized into two clear camps: (1) exclusive congressional authority to initiate wars and (2) independent presidential executive powers to initiate wars with or without congressional involvement.<sup>278</sup> Both wholly contradict each other. Instead, Douglas Kriner, Mariah Zeisberg,<sup>279</sup> and Stephen Griffin<sup>280</sup> believe that there is an inter-branch deliberation between Congress and the president.<sup>281</sup> The actual balance of war powers lies between these two opposing poles.<sup>282</sup> For instance, a plain reading of the Constitution, the Convention, and the ratification debates leaves no ambiguity in suggesting that a president cannot independently initiate a war without involving Congress.<sup>283</sup> However, Congress has delegated sweeping powers to the president through AUMFs 2001 and 2002, by writing a blank check,<sup>284</sup> though limiting the use of appropriate force against the plotters and perpetrators of the events of 9/11.<sup>285</sup> However, presidents have extensively claimed that they possess the prerequisite authority to initiate wars without involving Congress under Article II of the Constitution.<sup>286</sup> They rely on 125 instances where presidents have used force without involving Congress.<sup>287</sup> Presidents in the eighteenth and nineteenth century including Polk, however, did not in these instances claim unilateral war powers while asserting executive powers, and even sought congressional approval and war declarations in Rio Grande and Mexico.<sup>288</sup> An example of the stark contrast between presidential imperialism and congressionalists can be seen when comparing how Roosevelt cajoled

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278. See Kriner, *supra* note 20, at 1275.

279. See ZEISBERG, *supra* note 23, at 78–84.

280. See GRIFFIN, *supra* note 23, at 7–8.

281. See Kriner, *supra* note 20, at 1275–76.

282. *Id.* at 1275–78.

283. See Lofgren, *supra* note 25.

284. See Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted); see Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3(a)(1) (2002) (enacted); Kriner, *supra* note 20, at 1276; see also GRIMMETT, *supra* note 28, at 2–3.

285. See Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted); see Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3(a)(1) (2002) (enacted); see also Kriner, *supra* note 20, at 2.

286. U.S. CONST. art. II; see also Kriner, *supra* note 20, at 1276.

287. See Fisher, *supra* note 38, at 262; Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 473, 484 (Mar. 28, 1966).

288. See GRIMMETT, *supra* note 28; Kriner, *supra* note 20, at 1980; GRIFFIN, *supra* note 23, at 7–8.

Congress for American entry in World War II, whereas Truman rejected all congressional appeals to seek a declaration of war against Korea.<sup>289</sup> In fact, rightfully, Congress can declare wars, and the president can defend the nation against all attacks and aggression. However, the president can only use these powers for defensive purposes, and not for other purposes.<sup>290</sup> Yet, it is pertinent to note here that, of all the presidents that did claim the unilateral power to authorize a war, many if not all of them sought or used congressional authority to use force,<sup>291</sup> which appears to be a contradiction to their legal argument to claim independent presidential war powers. The framers of the U.S. Constitution intended to vest war powers in Congress, in the hands of many,<sup>292</sup> because the executive branch was not to be trusted.<sup>293</sup> They intended to limit presidential powers to only repelling attacks,<sup>294</sup> and not to commence them,<sup>295</sup> and to install appropriate checks and balances in this system.<sup>296</sup> The Supreme Court validated this assertion that presidents are bound to repel attacks and not initiate them.<sup>297</sup> Consequently, presidents only possess unquestioned independent defensive war powers.<sup>298</sup> However, for the extended use of force against non-imminent threats, scholars argue that under the WPR, the president must obtain congressional approval for the use of military force.<sup>299</sup> Why does the Constitution empower Congress to repel the invasions along with the overall power to declare war if it intended to empower the president to have independent war powers? The founding fathers were well aware that initiating a war, or spending billions of tax dollars, is a matter of public debate.<sup>300</sup> In the famous case of *United States v. Smith*, the court also agreed that a president cannot waive the statutory

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289. See GRIFFIN, *supra* note 23, at 7–8; Kriner, *supra* note 20, at 6.

290. See ZEISBERG, *supra* note 23, at 38–41; Kriner, *supra* note 20, at 1281–82.

291. See ZEISBERG, *supra* note 23, at 7; George W. Bush, *Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002*, U. CAL. SANTA BARBARA: AM. PRESIDENCY PROJECT (Oct. 16, 2002), <https://www.presidency.ucsb.edu/documents/statement-signing-the-authorization-for-use-military-force-against-iraq-resolution-2002> [perma.cc/LER3-DWN2].

292. See ELLIOT, *supra* note 64, at 2:528; see also Fisher, *supra* note 38, at 261.

293. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57, at 2:318; see also Fisher, *supra* note 38, at 261.

294. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57, at 2:318; see also Fisher, *supra* note 38, at 261.

295. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57, at 2:318; see also Fisher, *supra* note 38, at 261.

296. See Fisher, *supra* note 38, at 261; see also ELLIOT, *supra* note 64, at 2:528.

297. See Daskal & Vladeck, *supra* note 88, at 136; U.N. Charter art. 51; The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

298. See Daskal & Vladeck, *supra* note 88, at 146.

299. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (1973); see also Daskal & Vladeck, *supra* note 88, at 137.

300. See Daskal & Vladeck, *supra* note 88, at 138.

provisions and “cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.”<sup>301</sup>

However, AUMF 2001 allows the president to use “all necessary and appropriate force” and gives the president vast powers to employ all resources and methods available to his discretion.<sup>302</sup> The AUMF 2001 allows this use of force “against those nations, organizations, or persons, [that the president] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,”<sup>303</sup> to “prevent any future acts of international terrorism against United States by such nations, organizations or persons.”<sup>304</sup> The AUMF 2001 does not limit its authorization of use of force by geographical location.<sup>305</sup> The only limitation is the requirement of the connection of the enemy with the 9/11 events.<sup>306</sup> Al Qaeda (which was responsible for the 9/11 events)<sup>307</sup> and the Taliban (which harbored Al Qaeda)<sup>308</sup> come within the scope of the AUMF 2001.<sup>309</sup> However, the executive branch widened this 9/11 connection limitation by including all “hostilities against coalition members” in the definition of its enemy.<sup>310</sup> This disproportionately widened the scope of the 2001 AUMF, because it included organizations that had nothing to do with the U.S., Al Qaeda, or the 9/11 events<sup>311</sup> to justify its unbounded war on terror.<sup>312</sup> The scope of AUMF 2001 has evolved and outgrown its real objectives in order to justify war against all sorts of Islamic terrorism, which has ostensibly been taken to mean “associated forces.”<sup>313</sup>

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301. United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

302. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (enacted).

303. *Id.*

304. *Id.*

305. *See id.*

306. *Id.*

307. *See* Bradley & Goldsmith, *supra* note 89, at 2109.

308. *See* LOVELACE, *supra* note 145, at 153.

309. *See* Hamli v. Obama, 616 F. Supp. 2d 63, 74 (D.D.C. 2009); K. ALAN KRONSTADT & KENNETH KATZMAN, CONG. RESEARCH SERV., RL34763, ISLAMIST MILITANCY IN THE PAKISTAN-AFGHANISTAN BORDER REGION AND U.S. POLICY 6 (2008); President Barack Obama, Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009); Rand, *supra* note 131, at 142.

310. *See* Rand, *supra* note 131, at 148.

311. *See id.*

312. *See* 147 CONG. REC. 17,138 (2001) (statement of Rep. Cardin); *id.* at 17,041 (statement of Sen. Feingold); *id.* at 17,040 (statement of Sen. Levin); *id.* at 17,114 (statement of Rep. Norton); *id.* at 17,043–44 (statement of Sen. Snowe); Rand, *supra* note 131, at 149–51.

313. *See* Rand, *supra* note 131, at 134–35.

For instance, President Obama stretched the meaning and scope of AUMF 2001 by including ISIS,<sup>314</sup> as a justification to launch attacks<sup>315</sup> without congressional approval.<sup>316</sup> The U.S. is targeting ISIS on the presumption of its association with Al Qaeda. The U.S. is relying on the expansive interpretation of the term “associated forces”<sup>317</sup> to extend Al Qaeda’s responsibility for the 9/11 events to ISIS despite the fact that Al Qaeda has disassociated itself from ISIS.<sup>318</sup> As a result, scholars argue that because of the shaky ties between Al Qaeda and ISIS, the U.S. must not enter into a long-term conflict with ISIS by involving U.S. forces without first debating it with Congress and acquiring new authorization.<sup>319</sup> Despite Obama’s claims to expand and use AUMF 2001’s mandate against ISIS,<sup>320</sup> and the reliance on independent presidential powers and AUMFs 2001 and 2002,<sup>321</sup> the administration formally asked Congress for a new AUMF against ISIS in 2015.<sup>322</sup>

In conclusion, the U.S. is divided into two groups; imperialists and congressionalists. Imperialists, comprising of the president and a few congressmen, advocate for the fight against ISIS, whereas congressionalists, comprising of the majority of congressmen and a few scholars, do not seek war against ISIS. Imperialists exorbitantly claim that the fight against ISIS is authorized by imperialistic independent presidential executive powers and by both AUMFs 2001 and 2002.<sup>323</sup> For this, imperialists rely on misinterpretations of the Constitution and AUMFs 2001 and 2002.<sup>324</sup> Interestingly, imperialists also seek a new AUMF from Congress to be able to fight ISIS.<sup>325</sup> By seeking a new AUMF, imperialists confirm that they

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314. See Wagner, *supra* note 14, at 252.

315. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015); see also Letter from President Barack Obama to Congress (Feb. 11, 2015) (on file with the Obama White House Office of the Press Sec’y).

316. See Wagner, *supra* note 14, at 247.

317. See Miller, *supra* note 176; see also Wagner, *supra* note 14, at 255.

318. See Sly, *supra* note 177.

319. See Wagner, *supra* note 14, at 256.

320. See Savage, *supra* note 180; see also Bradley & Goldsmith, *supra* note 180, at 20.

321. See WEED, *supra* note 19, at 1.

322. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015).

323. See REPORT, *supra* note 11.

324. See WEED, *supra* note 19, at 7.

325. See Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. (2015); see also Presidential Draft Proposal Submitted to Congress: Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant, J. Res. § 2 (2015); see also S.J. Res. 47, 113th Cong. (2014);

lack the legal basis to advocate authority to fight ISIS through the mandate of imperialistic independent presidential powers or the AUMFs 2001 and 2002. On the other hand, congressionalists believe that the independent presidential war powers are limited to the defensive use of force.<sup>326</sup> Therefore, the executive branch needs congressional approval for any long-term use of force against future threats.<sup>327</sup>

Congressionalists also believe that the scope of AUMFs 2001 and 2002 does not include ISIS,<sup>328</sup> and the U.S. does not need a new AUMF or a new never-ending war.<sup>329</sup> This argument is rooted in the fact that the U.S. has not sustained a large armed attack by ISIS,<sup>330</sup> the war on terror has been proved counterproductive,<sup>331</sup> and the previous AUMFs have been misused and misinterpreted.<sup>332</sup> Moreover, because Congress has not yet passed a new AUMF, it is evident that the consensus amongst the majority of congressmen is that the U.S. does not need a new AUMF to fight ISIS or authorize a new never-ending war. Therefore, this Article concludes that the U.S. does not need a new AUMF, since it is not at war with ISIS.<sup>333</sup> The presidential war powers have been misused in the past, and the scope of both AUMFs 2001 and 2001 has been expansively interpreted and subsequently misused to continue a never-ending war.<sup>334</sup>

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H.R.J. Res. 27, 114th Cong. (2015); *see also* H.R.J. Res. 33, 114th Cong. § 2 (2015); *see also* S. Res. 1587, 114th Cong. §§ 3, 8 (2015); *see also* H.R. Res. 4208, 114th Cong. § 3 (2015); *see also* S.J. Res. 26, 114th Cong. (2015); *see also* S.J. Res. 29, 114th Cong. (2016).

326. *See* Daskal & Vladeck, *supra* note 88, at 119–36; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57, at 2:318; Fisher, *supra* note 38, at 261.

327. *See* Wagner, *supra* note 14, at 256.

328. *See* Wagner, *supra* note 14, at 252.

329. *See* Weed, *supra* note 19, at 7.

330. *See* Daskal & Vladeck, *supra* note 88, at 128; *see also* Wagner, *supra* note 14, at 256.

331. *See* Daskal & Vladeck, *supra* note 88, at 128; *see also* DORRIEN, *supra* note 7, at 227.

332. *See* WEED, *supra* note 19, at 7.

333. *See* Daskal & Vladeck, *supra* note 88, at 128.

334. *See* WEED, *supra* note 19, at 5–9.

